Supreme Court, U.S.
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No. 94-251

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN PAUL ROBERTSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL R. DREEBEN
Acting Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the interstate movement of goods and people in connection with the operation of a gold mine is sufficient to justify the conclusion that the activities of the gold mine affect interstate commerce within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 15 F.3d 862.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1994. The court of appeals denied a petition for rehearing on April 26, 1994. Pet. App. 37a-38a. On July 15, 1994, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 24, 1994. The petition for a writ of certiorari was filed on August 10, 1994, and was granted on October 17,

1994. J.A. 79. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, and the pertinent provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*, are set forth in an appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, respondent was convicted on one count of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; three counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and one count of investing proceeds from a pattern of racketeering activity in an enterprise the activities of which affected interstate and foreign commerce, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a). Respondent was sentenced to concurrent terms of 20 years' imprisonment on each of the five counts. The court of appeals affirmed respondent's narcotics convictions, but it reversed his RICO conviction. Pet. App. 1a-36a.

1. Respondent is a former Assistant United States Attorney who became a criminal defense lawyer in Los Angeles, California. He specialized in defending narcotics cases, and eventually became involved in the narcotics trade. On November 15, 1983, respondent was retained to represent Julio Silva-

Lopera (Silva), who had been arrested on a cocaine charge by agents of the Drug Enforcement Administration. Silva told respondent that he had two kilograms of cocaine and $980,000 in the trunk of his Cadillac. Silva instructed respondent to have Silva's wife place the Cadillac in storage until Silva was released from jail. Respondent assured Silva that he would take care of the matter. Pet. App. 2a-3a; Tr. 61-76, 363-364.

Instead of complying with Silva's request, respondent stole the Cadillac and its contents. On November 22, 1983, respondent drove the Cadillac to the home of his estranged wife in Phoenix, Arizona. Respondent's wife, a former federal probation officer in Los Angeles, saw cocaine and a large amount of money in the trunk. Respondent instructed her to open a safe deposit box at a Phoenix bank and deposit the money, which she and her father estimated to be a half-million dollars. Respondent also instructed her to make deposits of less than $10,000 into different banks in the Phoenix area. Respondent told Silva that he had been unable to locate the car; Silva then fired respondent and hired new counsel. Pet. App. 3a; Tr. 77-80, 371-380.

In February 1984, respondent quit the practice of law in California and reconciled with his wife. Respondent and his wife purchased a house near Phoenix for $270,000 in cash; they also made additional large cash purchases totaling $700,000. Pet. App. 3a; Tr. 383-405.

Respondent and his wife separated again in the fall of 1984. In January 1985, respondent moved into the home of Richard and Janet Horchler, where he continued his drug trafficking activities. The Horchlers saw respondent with several hundred

thousand dollars and large quantities of cocaine. Respondent wore rubber gloves when counting the money, telling Janet Horchler that he could not leave fingerprints on it. Pet. App. 4a; Tr. 824-826, 967-969.

Respondent agreed to finance a partnership with the Horchlers to mine gold in Alaska. A partnership agreement was drawn up between respondent and Richard Horchler's son, Robert. Respondent paid in cash for placer gold mining claims near Fairbanks, Alaska ($125,000), mining equipment (approximately $100,000), and the traveling expenses for seven employees to go to Alaska. Some of the equipment was purchased in Los Angeles and transported to Alaska. When Robert Horchler exhausted the cash that respondent initially gave him, Horchler flew to Arizona, where respondent gave him an additional $55,000. When that money ran out, respondent mailed an additional $25,000. Respondent telephoned Robert Horchler from Arizona on a number of occasions to check on the progress of the mine. Pet. App. 4a-5a; Tr. 612, 615-616, 906-907, 913-914.

The partnership with the Horchlers was dissolved during the first mining season, but respondent continued the mining operation through 1987 as the Robertson Mining Co. In 1986, respondent financed the mine's expenses by means of a $300,000 loan, secured by a mortgage on the house in Phoenix. Respondent again hired a number of employees from outside Alaska to work in the mine, and he also purchased a small airplane for flying to and from Alaska. Silva's Cadillac was driven to Alaska for use in the mining operation. The mine produced between $200,000 and $290,000 of gold. Most of the gold was sold in Alaska, although respondent took

approximately $30,000 worth of gold nuggets out of the State. Throughout the period of ownership, respondent and his employees traveled between Alaska and the lower 48 States. Pet. App. 4a-5a; Tr. 455-463, 608-611, 743-744, 774-784, 898-900, 911, 1296-1299, 1706, 1719, 1722-1725, 1749.

2. On October 17, 1991, a federal grand jury returned an eight-count superseding indictment against respondent charging him with conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 (Count 1); possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 2 through 4); use of a communication facility in furtherance of a narcotics felony, in violation of 21 U.S.C. 843(b) (Count 5); investing proceeds from a pattern of racketeering activity in an enterprise the activities of which affected interstate and foreign commerce (*i.e.*, the gold mine in Alaska), in violation of 18 U.S.C. 1962(a) (Count 6); RICO forfeiture, 18 U.S.C. 1963 (Count 7); and conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 8). The jury found respondent guilty on Counts 1 through 4 and on Count 6, but not guilty on Counts 5 and 8. The jury did not reach a decision on the forfeiture charged in Count 7; that count was later dismissed. Respondent was sentenced to concurrent terms of 20 years' imprisonment on each of the five counts. Pet. App. 6a-7a.[1]

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[1] The district court declined to sentence respondent under the Sentencing Guidelines for his RICO conviction, which would have resulted in the sentence on that count being nonparolable. The government appealed the court's refusal

3. The court of appeals affirmed respondent's narcotics convictions, but it reversed his RICO conviction. Pet. App. 1a-36a. The court determined that there was insufficient proof that the activities of the "enterprise"—the Alaskan gold mine—"affect[ed] interstate or foreign commerce." 18 U.S.C. 1962(a). The court acknowledged that "[a] minimal effect on interstate commerce" is sufficient to satisfy that jurisdictional element, but, relying on circuit precedent, it stated that RICO's "interstate nexus requirement is not satisfied 'where local activities have incidental effects on interstate commerce.'" Pet. App. 8a-9a (quoting *Musick* v. *Burke*, 913 F.2d 1390, 1398 (9th Cir. 1990)). The court concluded that the "incidental effects" standard was not satisfied for several reasons.

The court first found no evidence that "the activities of the enterprise itself," as distinguished from the predicate acts of racketeering by which respondent funded the enterprise, affected interstate commerce. Pet. App. 9a. The court stated that the mine "was a relatively small and entirely local operation," which produced "only * * * approximately $200,000 in gold," and that, "with the exception of a few nuggets which [respondent] kept, none of the gold obtained from the mine was sold outside Alaska." *Ibid.*

The court also found that respondent's purchase of supplies and equipment and his hiring of personnel outside of Alaska were insufficient to establish an effect on interstate commerce, explaining that "[t]he purchase of 'equipment and supplies drawn generally from the stream of interstate commerce' is insufficient

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to apply the Guidelines to the RICO conviction, but the court of appeals did not reach the government's appeal, because of its reversal of the RICO conviction. See Pet. App. 26a-27a.

to establish the interstate nexus required under RICO." Pet. App. 9a-10a (quoting *Musick* v. *Burke*, 913 F.2d at 1397). The court further explained that

> [g]iven that Alaska is fairly isolated, most supplies must be shipped there via interstate commerce. Carried to its logical conclusion, the Government's argument would require us to find that any local Alaskan operation has an effect on interstate commerce merely because supplies, equipment and employees are shipped there. We decline to do so.

Id. at 10a. Finally, the court declined to give weight to respondent's travel to and from Alaska or the use of the Cadillac stolen from Silva in the mining operation, noting that those activities "had, at most, only an incidental effect on interstate commerce." *Ibid.*

SUMMARY OF ARGUMENT

A. RICO makes it unlawful for any person to use or invest any income derived from a pattern of racketeering activity in the "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a). It is well established that the phrase "affect * * * commerce" is a term of art that manifests Congress's intent to exercise its commerce power to the fullest extent permitted by the Constitution.

The legislative history and findings that Congress made upon RICO's enactment demonstrate that Congress was aware of the significance of the jurisdictional language it enacted, and that Congress deliberately adopted that broad formulation because of its concern about the aggregate effect of racketeering activities on the national economy. Those materials also

demonstrate that one of Congress's principal goals in enacting RICO was to protect even the smallest local enterprises against infiltration by organized crime—a goal that would be thwarted by the narrow reading of RICO's jurisdictional nexus requirement adopted by the Ninth Circuit in this case.

B. Applying the correct standard under the Commerce Clause, there was ample evidence that the activities of respondent's Alaskan gold mining enterprise "affect[ed] interstate or foreign commerce." The court of appeals conceded that respondent and his employees traveled between Alaska and the lower 48 States during the period of ownership, that supplies and equipment were shipped to the mine from the lower 48 States, that the mine sold a substantial amount of gold in Alaska, and that respondent mortgaged his Arizona home to finance the operations of the mine. In addition, respondent and his associates used the instrumentalities of interstate commerce—the telephone and the mails—in connection with the operations of the mine.

The Ninth Circuit erroneously found the government's proof insufficient on the ground that the proof established that the mine's activities had no more than "an incidental effect on interstate commerce" (Pet. App. 9a), and that, in view of Alaska's geographical isolation, it was insufficient to show that the mine, like most Alaskan businesses, obtained equipment and supplies through interstate shipments (*id.* at 9a-10a). While there was a time when "incidental" effects on interstate commerce were held beyond the power of Congress to regulate, this Court long ago abandoned that approach, and it has repeatedly refused invitations to "take th[e] long backward step" toward that discredited doctrine. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948). As for Alaska's geographical isolation, it is illogical to suggest that the greater a State's dependence on interstate commerce the less likely it will be that activities within its borders will affect interstate commerce. Because no State of the Union is entirely self-sufficient, acceptance of that principle would jeopardize Congress's ability to regulate commerce. No decision of this Court supports such a result.

ARGUMENT

THE ACTIVITIES OF RESPONDENT'S GOLD MINING ENTERPRISE "AFFECTED INTERSTATE COMMERCE" WITHIN THE MEANING OF RICO

Federal statutes regulating activity that "affects" interstate commerce have long been understood to be applicable whenever the activity in question involves the interstate movement of goods or people, or the use of instrumentalities of interstate commerce, such as the mails or the interstate wires. With the exception of the Ninth Circuit, every court of appeals has applied that principle in construing the requirement of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962, that the activities of the "enterprise" must "affect[] interstate or foreign commerce." See *United States* v. *Doherty*, 867 F.2d 47, 68 (1st Cir.) (Breyer, J.), cert. denied, 492 U.S. 918 (1989); *United States* v. *Mannino*, 635 F.2d 110, 118 (2d Cir. 1980); *United States* v. *Allen*, 656 F.2d 964, 964 (4th Cir. 1981) (per curiam); *United States* v. *Stratton*, 649 F.2d 1066, 1075 n.12 (5th Cir. 1981); *United States* v. *Robinson*, 763 F.2d 778, 781 (6th Cir. 1985); *United States* v. *Muskovsky*, 863

F.2d 1319, 1325 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989); *United States* v. *Norton*, 867 F.2d 1354, 1359 (11th Cir.), cert. denied, 491 U.S. 907, 493 U.S. 871 (1989). The majority view is correct, and this Court should accordingly reject the Ninth Circuit's contrary construction of RICO.

A. Congress Intended The RICO Statute To Reach To The Full Extent Of The Commerce Clause Power

1. In construing RICO, this Court has consistently emphasized that the statutory language "must ordinarily be regarded as conclusive." *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). See also *National Organization for Women, Inc.* v. *Scheidler*, 114 S. Ct. 798, 806 (1994); *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1169 (1993). RICO makes it unlawful for any person to use or invest any income derived from a pattern of racketeering activity in the "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a). That language indicates Congress's intention to exercise its full constitutional authority under the Commerce Clause.

As this Court has repeatedly noted, Congress is well aware of the distinction established by this Court's Commerce Clause cases between legislation limited to activities "in" commerce and the more expansive legislation covering activities that "affect" commerce. *Russell* v. *United States*, 471 U.S. 858, 859 n.4 (1985);[2] *Scarborough* v. *United States*, 431

[2] In *Russell*, this Court unanimously rejected the claim that the attempted arson of a two-unit apartment building, which the defendant owned and held for use as rental property, did not have a sufficient effect on interstate commerce to warrant conviction under 18 U.S.C. 844(i). Like RICO, Section 844(i) was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1102, 84 Stat. 956-958. Section 844(i) criminalizes the arson or attempted arson of "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

U.S. 563, 571 (1977); *United States* v. *American Bldg. Maintenance Indus.*, 422 U.S. 271, 280 (1975). When Congress legislates solely with respect to activities "in" commerce, the statute ordinarily will reach only those activities that are actually within the flow of commerce or directly connected with it. See, *e.g.*, *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 194-195 (1974). When it employs the phrase "affecting interstate commerce," however, Congress "expresses an intent * * * to exercise its full power under the Commerce Clause." *Russell* v. *United States*, 471 U.S. at 859; see also *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam) (by using phrase "affecting commerce," Congress intended to exercise "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause") (emphasis omitted); *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 647 (1944) ("when [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce").[3]

[3] In this regard, RICO's reach is similar to that of the Hobbs Act, 18 U.S.C. 1951. Compare 18 U.S.C. 1962(a) ("any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce") with 18 U.S.C.

Congress adopted both formulations conjunctively in enacting RICO, and thereby clearly evinced its intent to cover all "enterprises" that come within the scope of the constitutional power to regulate commerce. That broad jurisdictional reach is consistent with Congress's more general approach to RICO. As this Court has noted, "the pattern of the RICO statute" is to "utiliz[e] terms and concepts of breadth." *Russello* v. *United States*, 464 U.S. 16, 21 (1983); see also *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 237, 249 (1989). RICO therefore "is to be read broadly" in accordance with that "self-consciously expansive language and overall approach." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 497-498 (1985). Neither the Ninth Circuit nor respondent has provided a persuasive reason for departing from

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1951(a) ("[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce"). Following this Court's lead, the courts of appeals have uniformly interpreted the Hobbs Act to reach the activities of even the smallest local enterprises. See, *e.g.*, *United States* v. *Culbert*, 435 U.S. 371, 373 (1978) ("These words do not lend themselves to restrictive interpretation; as we have recognized, they 'manifest . . . a purpose to use all the constitutional power Congress has to punish interference with interstate commerce' "), quoting *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); *United States* v. *Brown*, 959 F.2d 63, 67-68 (6th Cir. 1992) (tavern sold beer brewed in another State); *United States* v. *Butt*, 955 F.2d 77, 80 n.2 (1st Cir. 1992) (both RICO and the Hobbs Act reach extortion of protection money from prostitutes in Malden, Massachusetts); *United States* v. *Calder*, 641 F.2d 76, 78 (2d Cir.) (restaurant sold Canadian wine), cert. denied, 451 U.S. 912, 454 U.S. 843 (1981); *United States* v. *Gambino*, 566 F.2d 414, 418-419 (2d Cir. 1977) (private garbage collection in the Bronx), cert. denied, 434 U.S. 952 (1978).

that principle in the context of the interstate nexus requirement.

2. The legislative history of RICO confirms the breadth of the jurisdictional authority that Congress intended to invoke. RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941, which grew out of deep congressional concern about the growth of organized crime in the United States. That concern is reflected in the "Statement of Findings and Purpose" that prefaced the Act (Pub. L. No. 91-452, § 1, 84 Stat. 922-923, 18 U.S.C. 1961 note), which describes the problem of organized crime and its effects on the economic health of the Nation.

Congress found that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption," that money and power derived from those illegal endeavors "are increasingly used to infiltrate and corrupt legitimate business and labor unions," and that "organized crime activities in the United States weaken the stability of the Nation's economic system * * * [and] seriously burden interstate and foreign commerce." Pub. L. No. 91-452, § 1, 84 Stat. 922-923, 18 U.S.C. 1961 note. Based on those findings, Congress intended that RICO would "provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello* v. *United States*, 464 U.S. at 26. And Congress reinforced the sweep of those new weapons by expressly directing that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial

purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947.

Congress did not limit its focus to the corruption or infiltration of business enterprises that were engaged in widespread interstate commercial activity. Quite the contrary, the Statement of Findings and Purpose reflects Congress's concern with the aggregate effect of organized crime's pernicious illegal activities on the national economy, and declares as RICO's purpose "the eradication of organized crime in the United States." Pub. L. No. 91-452, § 1, 84 Stat. 923, 18 U.S.C. 1961 note. Congress clearly understood that attainment of that ambitious goal required the invocation of its full constitutional authority under the Commerce Clause. Cf. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 435 (1932). Indeed, the House committee report that accompanied the Organized Crime Control Act of 1970 reflects Congress's specific awareness of the significance of the jurisdictional language it chose; in discussing the related provisions of Title XI (which were at issue in *Russell* v. *United States*, *supra*), the report cited this Court's opinion in *NLRB* v. *Reliance Fuel Oil Corp.*, *supra*, for the proposition that "the term affecting [interstate or foreign] 'commerce' represents 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." H.R. Rep. No. 1549, 91st Cong., 2d Sess. 70 (1970) (quoting 371 U.S. at 226).

Moreover, Congress realized that "[c]ontrol of business concerns ha[d] been acquired by the sub rosa investment of profits acquired from illegal ventures," S. Rep. No. 617, 91st Cong., 1st Sess. 77 (1969), and accordingly it was particularly concerned about the infiltration of legitimate businesses by organized crime. That "point is made time and again

during the debates and in the hearings before the House and Senate." *United States* v. *Turkette*, 452 U.S. at 591.[4] The Senate committee report that accompanied the legislation makes clear that many of the businesses that had been infiltrated by organized crime were, by their nature, purely local enterprises,

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[4] See, *e.g.*, 115 Cong. Rec. 827 (1969) (remarks of Sen. McClellan) ("Organized crime * * * uses its ill-gotten gains * * * to infiltrate and secure control of legitimate business and labor union activities"); 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan) ("illegally gained revenue also makes it possible for organized crime to infiltrate and pollute legitimate business"); *id.* at 603 (remarks of Sen. Yarborough) ("[RICO] is designed to root out the influence of organized crime in legitimate business, into which billions of dollars of illegally obtained money is channeled"); *ibid.* (remarks of Sen. Allott) ("gambling * * * provides most of the funds that yearly pour into * * * the infiltration of labor unions and legitimate businesses"); *id.* at 606 (remarks of Sen. Byrd) ("loan sharking paves the way for organized criminals to gain access to and eventually take over the control of thousands of legitimate businesses"); *id.* at 35,193 (remarks of Rep. Poff) ("[T]itle IX * * * will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself"); *id.* at 35,201 (remarks of Rep. Poff) ("The money which the syndicate uses to infiltrate legitimate business enterprises comes largely from gambling receipts"); *id.* at 35,294 (remarks of Rep. Poff) ("the profits of illegal gambling * * * go[] far toward providing the capital that eventually goes into * * * the infiltration of legitimate businesses"); H.R. Rep. No. 1574, 90th Cong., 2d Sess. 5 (1968) ("The President's Crime Commission found that the greatest menace that organized crime presents is its ability through the accumulation of illegal gains to infiltrate into legitimate business and labor unions").

such as bowling alleys, ballrooms, restaurants, and drug stores. See S. Rep. No. 617, *supra*, at 76-77. Indeed, Congress expressed special concern for the "small or marginal businessman who is most easily subject to invasion by organized crime." *Id.* at 77.

Congress could not have believed that the connection of those small businesses with interstate commerce would typically be more extensive than "[t]he purchase of 'equipment and supplies drawn generally from the stream of interstate commerce.'" Pet. App. 9a-10a (quoting *Musick* v. *Burke*, 913 F.2d 1390, 1397 (9th Cir. 1990)). Yet under the Ninth Circuit's view of RICO's interstate nexus requirement, it is precisely those small and local business "enterprises" that organized crime can capture without fear of liability under 18 U.S.C. 1962(a). Thus, under the view taken by the Ninth Circuit, "[w]hole areas of organized criminal activity would be placed beyond the substantive reach of the enactment." *United States* v. *Turkette*, 452 U.S. at 589. There is no warrant for embracing a result so contrary to the goals that Congress intended to accomplish. See, *e.g.*, *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

B. The Activities Of Respondent's Gold Mining Enterprise Affected Interstate Commerce

The court of appeals did not dispute that Congress intended to invoke its full constitutional authority under the Commerce Clause in enacting RICO. It relied extensively on its earlier decision in *Musick* v. *Burke*, *supra*, which held that the jurisdictional reach of RICO extends to the limits of Congress's constitutional power. 913 F.2d at 1398. The court seriously erred, however, in concluding that the activities of

respondent's gold mine did not affect interstate commerce under the constitutional standard.

1. While respondent's gold mine was not a large enterprise, Congress's power to regulate interstate commerce, combined with the Necessary and Proper Clause, Art. I, § 8, Cl. 18, extends to "relatively small and entirely local operation[s]" (Pet. App. 9a). This Court has held that Congress's power reaches the farmer who grows wheat and bakes his own bread, because even that wholly intrastate activity can affect interstate commerce. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942). The commerce power also reaches regulation of the price of intrastate milk sales, because those sales affect the price of interstate sales. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119-121 (1942). It reaches the local employment practices of employers whose goods later are shipped interstate. *United States* v. *Darby*, 312 U.S. 100, 118-123 (1941). And it reaches small family-owned restaurants and motels, because they may obtain food from out of state or serve interstate travelers. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-258 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 296-301 (1964). See also *Hodel* v. *Indiana*, 452 U.S. 314, 324 (1981) (commerce power allows Congress to protect "prime farmland" from damage); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 280-283 (1981) (commerce power allows Congress to regulate the environmental impact of "surface mining" for coal on private land, even if that activity might be characterized as "local" land use); *Scarborough* v. *United States*, 431 U.S. at 575 (commerce power allows Congress to forbid felons to possess guns that have ever traveled interstate); *United States* v.

Sullivan, 332 U.S. 689, 697-698 (1948) (commerce power allows Congress to prohibit relabeling of drugs after interstate shipment). In sum, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 464 (1949).

Under the constitutional standard, there was ample evidence that the activities of respondent's gold mine affected interstate and foreign commerce. The court of appeals conceded (Pet. App. 4a, 9a-10a) that the mine purchased mining equipment and supplies, and hired employees, from outside the State. Respondent also purchased an airplane that he used to travel to and from Alaska, and he took the Cadillac that he had stolen from Silva from California to Alaska, where the car was used in the mine's work. *Id.* at 5a, 10a. Those activities are sufficient, by themselves, to establish the requisite effect on interstate commerce, because they contributed directly to the movement of goods and persons across state lines. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. at 300-301 (restaurant's purchase of food from out of state affected commerce); *Daniel* v. *Paul*, 395 U.S. 298, 308 (1969) (club's purchase of a juke box manufactured out of state, which played records manufactured out of state, affected commerce); *United States* v. *Norton*, 867 F.2d at 1359 (interstate commerce affected when union officials traveled between Florida and Illinois); *United States* v. *Muskovsky*, 863 F.2d at 1325 (RICO's interstate nexus satisfied "simply because [the enterprise] purchases supplies and office equipment from companies located outside of Illinois"); *United States* v. *Robinson*, 763 F.2d at 781 (sale of "alcohol * * * manufactured out of state" provided "a sufficient

impact upon interstate commerce for purposes of" RICO); *United States* v. *Allen*, 656 F.2d at 964 ("the supplies used in Allen's bookmaking operations which originated outside of Maryland provided a sufficient nexus between the enterprise and interstate commerce to invoke RICO").[5]

Quite apart from the interstate travel and shipments generated by the enterprise, the gold mine's intrastate activities affected commerce. As this Court has repeatedly recognized, intrastate conduct, even if "trivial" when considered in isolation, comes within

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[5] See also *United States* v. *Borromeo*, 954 F.2d 245, 248 (4th Cir.) (enterprise "ordered controlled substances from Ohio and Maryland"), cert. denied, 112 S. Ct. 3012 (1992); *United States* v. *Farmer*, 924 F.2d 647, 651 (7th Cir. 1991) (drug scales were manufactured in another State); *United States* v. *Conn*, 769 F.2d 420, 424 (7th Cir. 1985) (enterprise "purchased equipment and office supplies from companies located outside the State of Illinois"); *Rose* v. *Bartle*, 871 F.2d 331, 356-358 (3d Cir. 1989) ("minimal" interstate nexus required by RICO satisfied by the fact that enterprise had entered into contracts with out-of-state businesses); *United States* v. *Long*, 651 F.2d 239, 241-242 (4th Cir.) (state senator's office affected interstate commerce because senator served as a member of the committee that appropriated the funds used for operating expenses and purchases by state agencies, including the agency responsible for licensing liquor coming into the state through interstate commerce), cert. denied, 454 U.S. 896 (1981); *United States* v. *Barton*, 647 F.2d 224, 234 (2d Cir.) (restaurant purchased less liquor and fish from other countries), cert. denied, 454 U.S. 857 (1981); *United States* v. *Altomare*, 625 F.2d 5, 8 (4th Cir. 1980) (activities of state prosecutor's office sufficiently affected interstate commerce when interstate telephone calls were placed from that office, supplies and materials used by the office originated outside the State, and out-of-state residents were involved in litigation with the office).

the reach of the Commerce Clause when it is part of a class of activities that in the aggregate substantially affects interstate or foreign commerce. See *Russell* v. *United States*, 471 U.S. at 862; *Perez* v. *United States*, 402 U.S. 146, 153-154 (1971); *Wickard* v. *Filburn*, 317 U.S. at 127-128; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. at 120.[6] As the court of appeals acknowledged (Pet. App. 9a), respondent's mine sold a significant amount of gold (worth at least $200,000) in Alaska. During the period of respondent's ownership, there were only three companies that purchased gold for refining and assaying in the area where the mine was located, and

[6] As this Court noted in *Perez* v. *United States*, 402 U.S. at 152-153, Congress has, on occasion, itself made the finding that a class of activities substantially affects commerce, and has dispensed with any requirement of further proof on the subject in each individual case. That class-of-activities analysis, however, also applies when Congress has required proof, in each individual case, that the regulated activity affected commerce. As the Court explained in *Polish National Alliance* v. *NLRB*, 322 U.S. at 648: "Congress [in the National Labor Relations Act, 29 U.S.C. 152(7)] * * * left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power," but that question "is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." See also *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 241-243, 246 (1980) (under Sherman Act, 15 U.S.C. 1, the requirement of an effect on interstate commerce may be satisfied by showing that the line of business, rather than the illegal conduct, affected commerce).

respondent and his associates developed commercial relationships with two of them. Tr. 1004-1015, 774-784.[7] The price paid per ounce by those Alaskan refiners to respondent and others fluctuated daily, and was based on the "spot" price set each morning by European traders in London, England. Tr. 1011. The record therefore established that the mine's intrastate output and sales were but part of the much larger market in precious metals that reached beyond the State, and indeed beyond the United States. See *Russell* v. *United States*, 471 U.S. at 862 (property "was * * * being used in an activity affecting commerce," because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties"). In those circumstances, the intrastate sale of the mine's output clearly affected interstate and foreign commerce under this Court's cases. See *Wickard* v. *Filburn*, 317 U.S. at 127-128; *United States* v. *Wrightwood Dairy Co.*, 315 U.S. at 120; see also *United States* v. *McManigal*, 708 F.2d 276, 283 (7th Cir.), vacated on other grounds, 464 U.S. 979 (1983).[8]

[7] The business records of the two refiners that purchased gold from respondent's mine—General Refining Corporation and Oxford Assaying and Refining Company—were introduced in evidence. See, *e.g.*, Government Exhibits (GXs) 259, 260, 261, 264, 266. The records relating to General Refining Corporation reflect the interstate nature of that refiner's gold business, since the firm's transaction records set forth the firm's addresses and telephone numbers not only in Alaska, but also in Hempstead, New York, and Los Angeles, California. See, *e.g.*, GXs 261, 262.

[8] The court of appeals also noted that respondent kept "a few nuggets" of the gold. Pet. App. 9a. That gold, which respondent took outside Alaska, was worth approximately

In addition, as the court of appeals noted (Pet. App. 4a-5a), respondent mortgaged his Phoenix home (purchased with cash stolen from Silva) to finance the mining enterprise's expenses in Alaska. The financial requirements of the mine therefore had an indirect effect on the market for real estate and credit in Arizona. By the same token, the Arizona transaction had the indirect effect of keeping the gold mine open in Alaska. A business that requires funds from out of state, and that is able to raise those funds by transactions in another State, clearly has an effect on interstate commerce. See *Hospital Bldg. Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 744 (1976) (effect on interstate commerce was properly alleged under the Sherman Act where out-of-state financing would not occur if the challenged anticompetitive practice succeeded); see also *United States* v. *McManigal*, 708 F.2d at 283.

Finally, the enterprise unquestionably used instrumentalities of interstate commerce—the telephone and the mails—to inform respondent of the progress of the operations, and it relied on those instrumentalities of interstate commerce to receive monetary support from respondent. See *Scarborough* v. *United States*, 431 U.S. at 575; *United States* v. *Doherty*, 867 F.2d at 68 ("slight" effect on interstate commerce required by RICO is satisfied by "placement of interstate telephone calls"), citing *United States* v. *Altomare*, 625 F.2d 5, 7-8 (4th Cir. 1980). See

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$30,000. Tr. 774-784, 1723. The shipment of that gold outside of Alaska is additional persuasive evidence that the activities of the mine affected interstate commerce. Cf. *United States* v. *Darby*, 312 U.S. at 117-119 (local employment practices of employers affect interstate commerce because some of the goods produced were later shipped interstate).

also *United States* v. *Malatesta*, 583 F.2d 748, 754 (1978) ("*any one*" of several interstate telephone calls sufficient to meet RICO's jurisdictional requirement), aff'd en banc, 590 F.2d 1379 (5th Cir.), cert. denied, 440 U.S. 962, 444 U.S. 846 (1979). Even considered separately, any of the foregoing activities would be sufficient to meet the government's burden. Taken as a whole, the effect of the enterprise's activities on interstate commerce is unmistakable.[9]

2. The Ninth Circuit's erroneous ruling on the interstate commerce issue appears to rest on two interrelated propositions. First, while conceding that

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[9] Respondent suggested at the petition stage that the interstate shipments of employees, equipment, and supplies that were established in this case should be disregarded, because they "d[id] not involve the operation of the enterprise but rather the establishment of the enterprise." Br. in Opp. 2. The court of appeals did not rely on that contention, which in any case is flawed factually and legally. As a factual matter, the interstate travel by respondent and his employees continued during respondent's entire period of ownership, as we have demonstrated (pp. 4-5, *supra*). Moreover, it is difficult to see how the purchase of supplies and equipment to be used in the day-to-day activities of the mine can possibly be disassociated from "the operation of the enterprise." As a legal matter, respondent has pointed to nothing in the language or legislative history of RICO, or in this Court's Commerce Clause cases, that supports the significance of the distinction on which he relies. On the contrary, Congress's express invocation of the "affecting commerce" test establishes that no such line was intended. See, *e.g.*, *Scarborough* v. *United States*, 431 U.S. at 564 n.1, 575 (in crime of "possess[ing] * * * affecting commerce * * * any firearm," jurisdictional element is satisfied by proof that the firearm was shipped in commerce at any point in time, even if that shipment occurred before the defendant acquired the firearm); *United States* v. *Sullivan*, 332 U.S. at 698.

proof of a "minimal" effect on interstate commerce is sufficient to satisfy RICO, the Ninth Circuit posited that "incidental" effects on commerce do not suffice, and it dismissed as "incidental" the movement of employees, equipment, and supplies to the mine from outside of Alaska during the period of ownership. Second, the Ninth Circuit appeared to believe that Alaska's geographical isolation and resulting dependence on interstate commerce meant that it was insufficient to show that out-of-state supplies were used in the enterprise. Pet. App. 9a-10a. Neither proposition has merit.[10]

First, the Ninth Circuit's distinction between "minimal" and "incidental" effects on commerce recalls "those mechanical distinctions" used in an earlier era of our Nation's Commerce Clause jurisprudence—during which activities "regarded as being only * * * 'incidental,' 'indirect,' or 'remote' " from an interstate transaction were deemed "to be * * *

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[10] The Ninth Circuit also appeared to believe (Pet. App. 8a-9a) that the interstate character of RICO predicate acts cannot be considered in determining whether the activities of an enterprise affect interstate commerce. Respondent also placed some emphasis on that proposition at the petition stage. Br. in Opp. 2. That proposition, however, has scant relevance to this case, because the government argued that it had established an effect on interstate commerce by virtue of activities of the RICO enterprise into which respondent invested funds, not by virtue of the underlying predicate acts that generated the funds. In any event, as we explained in our reply brief at the petition stage (U.S. Reply Br. 4 n.2), respondent's characterization of RICO precedents in this area is erroneous. See also *Rose* v. *Bartle*, 871 F.2d at 357 n.38; *R.A.G.S. Couture, Inc.* v. *Hyatt*, 774 F.2d 1350, 1353-1354 (5th Cir. 1985); *Bunker Ramo Corp.* v. *United Business Forms, Inc.*, 713 F.2d 1272, 1288-1289 (7th Cir. 1983).

beyond Congress' power to regulate." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 229-230 (1948). This Court's modern Commerce Clause cases expressly reject those unproductive attempts to identify which effects on commerce, while perceptible, are nonetheless "incidental," "indirect," or "remote." *Ibid.*; see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329 (1991) (requisite effect may be demonstrated "even though any actual impact on interstate commerce would be 'indirect' and 'fortuitous' "), quoting *Hospital Bldg. Co.* v. *Trustees of Rex Hospital*, 425 U.S. at 744; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 783-786 (1975). "[T]he essence" of the modern rule is that the nature or degree of the impact is irrelevant to whether Congress may exercise its power to regulate an activity. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. at 232. Rather, this Court's "cases have shown that, once an effect [on interstate commerce] is shown, no specific magnitude need be proved." *Goldfarb* v. *Virginia State Bar*, 421 U.S. at 785; see also *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 684-685 (1951). Whether the effects established in a given case are labeled "slight," *United States* v. *Doherty*, 867 F.2d at 68, or "minimal," or "incidental," the important point is that they are perceptible and identifiable; nothing more is required by this Court's cases.

Aside from the doctrinal unsoundness of placing "incidental" effects on interstate commerce beyond the reach of congressional regulation, the Ninth Circuit's distinction between "minimal" and "incidential" effects on such commerce is vague and elusive. Because the interstate nexus requirement is an element

of the crime, on which the jury must be instructed in every RICO case, arcane distinctions between "minimal" and "incidental" effects on commerce can only lead to jury confusion and arbitrary results. The net effect will be to exclude from RICO's coverage cases such as this one, and others that a jury or court determines on a case-by-case basis are too distant from interstate commerce, without any adequate explanation or justification for those results.

Second, Alaska's geographical isolation is no reason for ruling that interstate shipments of supplies, materials, and personnel to that State do *not* affect interstate commerce. Not only would that reasoning needlessly impair the government's ability to enforce scores of important statutes in isolated areas of the country, but it is also logically perverse. This Court has recognized that the growth in the dimensions and complexity of our economy, and the resulting pervasive dependence of every State on the channels of interstate commerce, is precisely the justification for Congress to regulate activities previously thought to be purely local—"[a]s interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power." *New York* v. *United States*, 112 S. Ct. 2408, 2419 (1992); see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. at 328-329. The Ninth Circuit's decision in this case turns that principle on its head. Under the Ninth Circuit's reasoning, the greater the dependence of a State on interstate commerce, the lesser the federal government's power to reach and regulate commercial activity occurring in that State. Neither logic nor precedent supports such an anomalous doctrine.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL R. DREEBEN
Acting Deputy Solicitor General

MIGUEL A. ESTRADA
Assistant to the Solicitor General

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APPENDIX

The Commerce Clause of the Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

18 U.S.C. 1961 (1988 & Supp. V 1993) provides:

> As used in this chapter—
>
> (1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial

institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor

organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States,

a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney

General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law

or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

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